

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Water Right )	
Permit 17332 and Water Right )	
Licenses 5715 and 12593 )	ORDER: WR 97-01
(Applications 25368, 12079, )	
and 17770) )	SOURCE: Mammoth Creek
)	
MAMMOTH COMMUNITY WATER )	COUNTY: Mono
DISTRICT, )	
)	
Permittee and Licensee. )	
_____ )	

**ORDER AMENDING PRELIMINARY CEASE AND DESIST ORDER NO. 9P.2  
AS DIRECTED BY MONO COUNTY SUPERIOR COURT  
AND AMENDING LICENSE 5715 TO COMPLY WITH  
FISH AND GAME CODE SECTION 5946**

BY THE BOARD:

**1.0 INTRODUCTION**

The Mammoth Community Water District (District) diverts water from Mammoth Creek for municipal purposes pursuant to Water Right Licenses 5715 and 12593, and Water Right Permit 17332. On January 20, 1994, the State Water Resources Control Board (SWRCB) entered Cease and Desist Order No. 9P.2 which directed, among other things, that the District comply with the minimum instream flow requirements specified as a condition of Water Right Permit 17332. Following an appeal by the District, the Superior Court for Mono County entered a writ of mandate dated October 21, 1996, which directs the SWRCB to establish interim instream flow requirements applicable to Permit 17332 as set forth below.<sup>1</sup>

This order amends the interim instream flow requirements applicable to water diversions under Permit 17332 as directed by the Superior Court. This order also amends License 5715 to

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<sup>1</sup> The writ of mandate was served on the SWRCB on November 7, 1996.

require compliance with section 5937 of the Fish and Game Code.<sup>2</sup> The subject of long-term instream flow requirements governing all diversions of water by the District will be addressed in a future order following appropriate proceedings.

## **2.0 FISH AND GAME CODE PROVISIONS GOVERNING INSTREAM FLOW REQUIREMENTS IN DISTRICT 4½**

Fish and Game Code section 5946 requires that all water right permits and licenses in Fish and Game District 4½ which are issued after 1953 be conditioned upon full compliance with Fish and Game Code section 5937. Section 5937 requires the owner of any dam to allow sufficient water at all times to pass through a fishway, or over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam. The SWRCB has a ministerial duty to condition permits and licenses issued after 1953 to require compliance with Fish and Game Code Section 5937. (*California Trout Inc. v. State Water Resources Control Board* (1990) 218 Cal.App. 187 [266 Cal.Rptr. 788].)

The SWRCB complies with section 5946 in one of two ways. In some instances, the SWRCB includes specific minimum instream flow requirements for protection of fish as a condition of a water right permit or license. In other instances, the SWRCB has included a more general condition requiring bypass of water to maintain fish in good condition. In recent years, the SWRCB has included Standard Permit Term 66 in all permits and licenses issued in District 4½ which do not contain more specific quantified flow requirements. Term 66 provides:

"In accordance with the requirements of Fish and Game Code Section 5946, this permit [license] is conditioned

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<sup>2</sup> Water Right License 12593 already contains a general condition requiring compliance with Fish and Game Code section 5937.

upon full compliance with Section 5937 of the Fish and Game Code."

### **3.0 INSTREAM FLOW REQUIREMENTS APPLICABLE TO WATER RIGHTS HELD BY MAMMOTH COMMUNITY WATER DISTRICT**

Permit 17332 contains a condition establishing quantified instream flow requirements. The District agreed to the condition in negotiations with a party who dismissed its protest against the District's water right application as part of the agreement. On December 23, 1991, the District submitted a petition to change the instream flow requirements applicable to diversions under Permit 17332. No action has been taken on that change petition because the District has not completed an environmental document in accordance with the California Environmental Quality Act. ("CEQA," Public Resources Code section 21000, et seq.)<sup>3</sup> Pending review and possible revision of the flows specified in Permit 17332, Preliminary Cease and Desist Order No. 9P.2 directed the District to comply with the established flow requirements as a condition of diverting water under the permit.

In considering the District's petition for review of Order No. 9P.2, the Superior Court for Mono County concluded that the original flow requirements established in Permit 17332 were the result of a very limited study. The court also stated that the weight of the evidence supports establishing a different schedule of minimum flow requirements, as proposed by the District and its consultants, to apply for an interim period pending amendment of Permit 17332 to establish revised long-term fishery flow requirements. By order dated October 21, 1996, the court directed the SWRCB to amend paragraph 2 of page 7 of Order

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<sup>3</sup> On September 30, 1994, the District submitted a schedule to the SWRCB which called for completion of an environmental document by March 22, 1995, if a negative declaration was prepared, and by December 29, 1995, if a full environmental impact report was prepared. The District has since advised the SWRCB that it will prepare a full environmental impact report, but the document has not yet been prepared.

No. 9P.2 to require compliance with the instream flow requirements proposed by the District and its consultants.

The SWRCB does not believe that the holder of a water right permit or license should be allowed to agree to a particular term at the time of applying for a permit, and then challenge the validity of the term of the permit or license in a later proceeding brought to enforce compliance.<sup>4</sup> In this instance, however, the SWRCB has elected not to appeal the Superior Court judgment regarding interim flow requirements. Rather, the SWRCB believes the public interest in this case will be best served by focusing on establishing long-term instream flow requirements which will apply to the District's diversions of water under all of its water rights on Mammoth Creek. This order amends Preliminary Cease and Desist Order No. 9P.2 to establish interim flows applicable to water diversion under Permit 17332 as directed by the Superior Court.

Water Right License 5715 does not include the standard term requiring compliance with section 5937. Until such time as quantified long-term flow requirements are established, License 5715 should be amended to include Standard Term 66 as discussed in Section 2.0 above.

Water Right License 12593 was issued on April 13, 1990. The license includes Standard Term 66 as set forth in Section 2.0 above. Until such time as the SWRCB conducts appropriate proceedings to establish quantified instream flow requirements

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<sup>4</sup> The SWRCB recognizes that in some instances immediate compliance with the conditions of a permit may be impossible and it may be in the public interest to adopt a schedule of compliance which includes a less stringent condition on an interim basis until such time as full compliance is possible. The SWRCB also recognizes that the terms of a permit are subject to review and modification following compliance with applicable procedures. The SWRCB does not believe, however, that an enforcement action provides the proper avenue for relaxing an established requirement for an indefinite period without regard to the permittee's ability to comply with the existing requirement.

applicable to the District's diversions from Mammoth Creek, no amendment of License 12593 is necessary.

Pending the establishment of quantified long-term instream flow requirements in a separate proceeding, neither License 5715 nor License 12593 will contain a condition specifying quantified minimum instream flows. In accordance with the direction of the Superior Court, this order provides that the District's water diversions under Permit 17332 are subject to the interim flow requirements recommended by the District's consultants. At the evidentiary hearing preceding Order No. 9P.2, the District's position was that the flows recommended by its consultants are the flows needed to maintain fish in good condition. Therefore, the SWRCB expects that the District will regulate all its diversions of water from Mammoth Creek to comply with the interim instream flow requirements applicable to Permit 17332.

#### **4.0 CONCLUSION**

The issue of maintaining sufficient instream flows for protection of the fish in Mammoth Creek has been before the SWRCB repeatedly in recent years. In 1987, 1988, and 1989, the District requested, and the SWRCB approved, issuance of temporary permits which allowed the District to divert water at times when otherwise applicable minimum flow requirements were not being met. The temporary permits were issued in order to allow the District to meet municipal water demands when it had very limited alternative supplies. As a result of the District's well construction program, the District's dependence upon diversion of surface water from Mammoth Creek has decreased in recent years. The subject of instream flow requirements governing diversions from Mammoth Creek, however, has not been resolved.

This order amends Preliminary Cease and Desist Order No. 9P.2 to establish interim instream flow requirements governing water diversions under Permit 17332. The order also amends License

5715 to comply with Fish and Game Code section 5946. As discussed previously, however, it still is necessary to establish long-term instream flow requirements governing the District's diversion of water from Mammoth Creek. Therefore, the order below directs the Chief of the Division of Water Rights to schedule a hearing at an appropriate time for the Board to receive evidence regarding establishment of long-term instream flow requirements for Mammoth Creek.

## ORDER

IT IS HEREBY ORDERED that Paragraph 2 on page 7 of Preliminary Cease and Desist Order No. 9P.2 is amended to read as follows:

2. Until such time as the State Board amends Permit 17332 to revise the long-term fishery flow requirements for Mammoth Creek, the District shall not divert water to storage or divert water directly from Mammoth Creek for municipal purposes whenever the mean daily instream flows, measured at the Old Mammoth Road Gage, are less than the following amounts:

[illegible]

MONTH	MEAN DAILY FLOW (cfs)
January	6.4
February	6.0
March	7.8
April	9.8
May	18.7
June	20.8
July	9.9
August	7.2
September	5.5
October	5.5
November	5.9
December	5.9

IT IS FURTHER ORDERED that Water Right License 5715 is amended to include the following additional condition:

"In accordance with the requirement of Fish and Game Code Section 5946, this license is conditioned upon full compliance with Section 5937 of the Fish and Game Code."

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IT IS ALSO ORDERED that the Chief of the Division of Water Rights schedule a hearing at an appropriate time to receive evidence regarding establishment of long-term instream flow requirements applicable to diversions of water from Mammoth Creek by the Mammoth Community Water District.

#### **CERTIFICATION**

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 8, 1997.

AYE:           John P. Caffrey  
                John W. Brown  
                Marc Del Piero  
                James M. Stubchaer  
                Mary Jane Forster

NO:           None.

ABSENT:       None.

ABSTAIN:      None.

/s/Maureen Marché  
Maureen Marché  
Administrative Assistant to the Board